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NO. _____

Supreme Court, U.S.
FILED
DEC 4 1987
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1987

PARIS DARNELL LANDON, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE WASHINGTON STATE COURT OF APPEALS

Michael J. Trickey
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Seattle, Washington 98125
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Counsel for Petitioner

December 4, 1987

QUESTIONS PRESENTED

1. Could any rational trier of fact, under the due process clause of the Fourteenth Amendment to the United States Constitution, have found the Petitioner, Paris Landon, guilty of assault in the second degree under the laws of the State of Washington by knowlingly inflicting grevious bodily harm upon another with or without a weapon when the state failed to prove that the Petitioner, Landon, was the principal who fired the pistol which wounded the victim, Thurmond Mikes, and that the shots were knowingly fired?

2. Can any rational trier of fact, under the due process clause of the Fourteenth Amendment to the United States Constitution, have found the Petitioner, Paris Landon, guilty of assault in the second degree by knowingly inflicting grevious bodily harm upon another with or without a weapon as an accomplice when the state was unable to prove beyond a

reasonable doubt who shot the victim, Thurmond Mikes, and that Mr. Landon shared the shooter's intent or was involved in planning or committing the crime to an extent greater than simply being present when the shooting occurred?

3. Did the trial court commit prejudicial error in finding beyond a reasonable doubt that the Petitioner, Paris Landon, committed the crime of assault in the second degree while armed with a deadly weapon that was also a firearm when the state was unable to satisify the Fourteenth Amendment due process requirement of proof beyond a reasonable doubt that Paris Landon actually shot Mr. Mikes, or that Mr. Landon knew that either of the other individuals present were armed?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Paris Landon, and the Respondent, State of Washington.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

PARIS LANDON, Petitioner

v.

STATE OF WASHINGTON, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
WASHINGTON STATE COURT OF APPEALS

The Petitioner, Paris Darnell Landon, respectfully prays that a Writ of Certiorari issue to review the decision of the Washington State Court of Appeals affirming Petitioner's conviction entered July 7, 1987 after the Washington State Supreme Court denied Mr. Landon's Petition for Review of that decision on October 6, 1987.

OPINIONS BELOW

A panel of Division II of the Court

of Appeals affirmed Petitioner conviction and that decision is reprinted in the Appendix hereto, P. 1a, infra.

The notation order of the Washington State Supreme Court denying the Petition for Review of that Court of Appeals' decision is reprinted in the Appendix hereto at p. 5a, infra, along with the Mandate in the case at p. 6a, infra.

JURISDICTION

The Petitioner, Paris Landon, appealed a judgment and sentence upon a jury verdict on behalf of the Respondent entered in Pierce County Superior Court of the State of Washington on August 15, 1985. A panel of the judges of Division II to the Washington Court of Appeals affirmed Petitioner's conviction on July 7, 1987, and the Washington State Supreme Court denied the Petition for Review of the Court Appeals' decision on October 6, 1987. Jurisdiction to review the decision of the Washington State Court of Appeals exists under 28 U.S.C. Section 1257(3).

Since the notation order of the Supreme Court denying the Petition for Review was entered on October 6, 1987, the appeal is timely within the meaning of Rule 20.1.

STATUTE INVOLVED

28 U.S.C. Section 1257(3) Jurisdiction over state courts.

The Supreme Court has jurisdiction to review decision of state court: " . . . by Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of or commission held or authority exercised under the United States."

STATEMENT OF THE CASE

In March, 1984, Thurmond and Georgette Mikes lived with their children and some friends on Golden Givens Road East near Tacoma in Pierce County, Washington. May 21 RP 3-6. Paris Landon was one of the people staying with them. May 21 RP 4. Mr. Landon knew one of the Mikes' nephews in Alaska fairly well. May

21 RP 5.

Jeff Smith was another friend of Mr. Mikes. May 21 RP 58-59. Mr. Smith had borrowed money from Mr. Mikes and had given him the title to a car owned by his wife, Diane Smith, as collateral to secure the debt. Ibid. Mr. Smith neglected to mention to his wife, Diane, that he had so pledged the title even though she had signed it over to Mr. Mikes. May 21 RP 58.

On March 24, 1984, Georgette Mikes left for work around 10:00 a.m. May 21 RP 6-7. When she returned home between 4:30 and 5:00 that afternoon, she discovered Mr. Landon with a friend and a set of scales in the kitchen. May 21 RP 9. Mr. Landon then left.

That evening, the Mikes' household received four phone calls. Two of the calls were from Paris Landon. Mr. Mikes, when he testified at the trial, essentially said that he could not understand what Mr. Landon was saying

because other people were shouting into the phone. May 21 RP 61. Mr. Mikes became tired around 9:00 p.m. and went to bed.

Shortly before midnight on March 24, Mr. Landon returned to the Mikes' residence with another person. No one ever identified that individual during the trial. Mrs. Mikes saw Mr. Landon through the window as he came to the front door and opened the door to speak with him.

Mr. Landon then asked to see Mr. Mikes. They proceeded to have a discussion regarding the title to Mr. Smith's automobile. RP 67. Mr. Mikes had learned from a phone call from Mr. Smith earlier in the evening that the title had been removed and that "a black man" had tried to obtain the keys to the car from Diane Smith. May 21 RP 51-52.

Shortly after Mr. Landon and the second individual arrived, a third person came to the door. May 21 RP 25, 42. Although Mr. Mikes claimed that an

individual named Alphonzo Ray, who was attending the trial, was one of the two unidentified persons in his home that evening, Mr. Ray testified as a defense witness that he was never present. May 21 RP 94-96.

Mr. Mikes then described what happened once the third individual arrived as follows:

> As I (Thurmond Mikes) walked toward them, they stepped back. My wife is standing this side, there is a panel where the door closes, and she's standing that side. He stepped back, and as I stepped up towards her, I kind of pushed her out of the way and I saw a gun. I said, " Well, okay, go ahead," and turned as if throwing my hands up to tell him to shoot me. I said, "There's nothing here, and I turned all the way around. I grabbed the gun with my left hand as it comes around. As I grabbed the gun, the guy and Paris are standing together and stepped together and came out with his right hand and I grabbed the gun as it went down and it went off and as it went off, I was grazed, but I never thought I was hit. . . The gun came out of Paris' coat, or in between him and the other guy, but it came up with Paris' hand. As it came up, that's when I said to go ahead, that I didn't have anything. I turned a full circle, but then as I was doing the circle, I was going to walk away, but I turned back around and grabbed the gun with my left hand and started

the motion toward the hand. May 21 RP 67-68, 71. (Emphasis added.)

Mrs. Mikes was not able to say who held the gun. Although Mr. Mikes testified that Mr. Landon was the one with the gun, he later admits that he only visualized the incident, thereby implying he does not know who actually held the gun when it went off. He finally testified that, "In my vision, I say Paris is the one that shot me". May 21 RP 77. Mr. Mikes also noted that he could not actually see the third party "until he stepped all the way out". May 21 RP 17.

One of the rounds from the gun struck Mr. Mikes' ring finger, and a second shot somehow hit him in the chest. The State presented no medical evidence about the extent of the wounds at the trial. Once the shooting was over, Mr. Landon and the other two individuals ran from the scene.

On April 16, 1984, the Pierce County Prosecuting Attorney's office filed an information charging Paris Landon with the

crime of assault in the second degree committed as follows:

> That Paris Darnell Landon, in Pierce County, Washington, on or about the 25th day of March, 1984, did unlawfully and feloniously knowingly inflict grievous bodily harm upon Thurmond Lee Mikes, a human being, with a weapon, to wit: a .22 caliber handgun, that being a firearm and deadly weapon, and invoking the provisions of RCW 9.41.025 and RCW 9.95.040, contrary to RCW 9A.36.020(1)(b), and against the peace and dignity of the State of Washington. Supplemental CP.

The affidavit for determination of probable cause filed in support of the information states in relevant part "that the defendant Paris Darnell Landon did 'without legal justification or excuse' shoot at and into the body of Thurmond Lee Mikes with a .22 caliber handgun." Ibid. There is no mention of accomplice liability and other document.

The matter came for trial by jury before a judge of the Pierce County Superior Court. In his opening statement, the prosecuting attorney summarized the State's theory as follows:

The State's going to present

> this case under the theory that Mr. Landon or an accomplice, Mr. Landon or one of these other men, actually shot Mr. Mikes. The State is going to proceed under the theory that Mr. Landon was the one who organized this. He's the one who knew Mr. Mikes, he was the one that was at home earlier in the day when the title became missing. He was the one who telephoned over when the conversation took place, and he was the one who knew where Thurmond Mikes lived. He brought all these people over to Thurmond's house, he stood in the doorway and argued with Thurmond and either he or one of his buddies shot Thurmond Mikes.
>
> Thurmond is not going to be able to tell you exactly who it is. Thurmond has his beliefs as to who he thinks it is, but he is not going to be able to say positively that he saw, because he didn't. He was scared. He saw the gun coming up from between these guys from the back and he tried to get away from it. After he was shot, he tried to get away from it. May 20 RP 6.

Immediately after the prosecuting attorney finished, Mr. Landon's defense counsel moved for dismissal based on the opening statement of the prosecuting attorney on the grounds that under Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), no rational trier of fact could find beyond a reasonable doubt that Mr. Landon was the individual who

actually shot Mr. Mikes. May 20 RP 8-9. The trial court denied the motion on the grounds that there was

> . . . enough information in the State's opening remarks to constitute the corpus delicti of the crime. It all depends on what the jury believes. His contention is - by his, I mean the State's - that the defendant here was the perpetrator of this entire affair and came up there with two men and they had a gun and somebody shot him, and this was in furtherance of some kind of conspiracy or joint venture, and for that reason, he is as responsible as the person who shot the gun. May 20 RP 9.

The State then presented its case essentially as set forth above. The court denied Mr. Landon's motion to dismiss without the need for the defense to argue the point. May 21 RP 97.

The defense case consisted of the testimony of Alphonzo Ray and Paris Landon. Mr. Landon testified he had brought $600 to Mr. Mikes to purchase a quarter ounce of cocaine, on the Friday preceding Saturday, March 24, 1984. He said Mr. Mikes gave him the title to the Smith automobile as security for the

cocaine transaction. He acknowledged that he had attempted to obtain the car keys from Diane Smith, and that he went over to the Mikes' residence on Saturday night, March 24, to determine when Mr. Mikes would provide him with the cocaine. He denied shooting Mr. Mikes. May 21 RP 105-125.

The jury returned a verdict of guilty to the charge of assault in the second degree with a special verdict that Mr. Landon was armed with a deadly weapon that was a firearm at the time of the crime. CP 3-4. On August 15, 1985, Judge Brown sentenced Mr. Landon to ten years in prison. CP 1-2. Mr. Landon appealed from the jury findings and the judgment and sentence. Supplemental CP. The Washington Court of Appeals affirmed the conviction and the Washington State Supreme Court denied review. 1a-6a.

REASON FOR GRANTING THE WRIT

The decision of the Washington Court of Appeals that there was sufficient

evidence under the due process clauses of the Fifth and Fourteenth Amendments to the Unites States Constitution for any rational trier of fact to uphold Petitioner's conviction for assault in the second degree while armed with a deadly weapon, to-wit: a firearm, conflicts with a decision of the Federal Court of Appeals and a decision of the United States Supreme Court.

The State of Washington, through the Pierce County Prosecuting Attorney, accused Mr. Landon of the crime of assault in the second degree as defined in RCW 9A.36.020(1)(b). That offense is set forth in RCW 9A.36.020(1)(b):

> Every person who, under circumstances not amounting to assault in the first degree, shall be guilty of assault in the second degree when he: . . . shall knowingly inflict grievous bodily harm upon another with or without a weapon . . . ." Assault in the second degree is a Class B Felony punishable by a maximum of ten years in prison and/or a $20,000 fine. RCW 9A.20.020(1)(b).

The mental element required to sustain the conviction on review is

criminal knowledge, defined as when "a person knows or acts knowingly with knowledge when: . . . he is aware of a fact, facts, or circumstances or result described by statute defining an offense . . . ." RCW 9A.08.010(b), .010(1)(b)(i). In Washington, the juries cannot presume that a person acts reasonably by acting knowingly; the standard remains subjective. State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980).

The prosecution also alleged that Mr. Landon committed the assault while armed with a deadly weapon that was also a firearm within the meaning of RCW 9.41.025 and RCW 9.95.040. RCW 9.41.025 provides in relevant part that:

> Any person who shall commit or attempt to commit any felony, . . ., while armed with or in a possession of any firearm, shall upon conviction, in addition to the penalty provided by statute for the crime committed without use or possession of a firearm, be imprisoned as herein provided: . . . for the first offense, the offender shall be guilty of a felony and the court shall impose a sentence of not less then five years, where sentence shall not be suspended or deferred .

. ."

The Washington Supreme Court upheld the use of the penalty enhancement provision in assault in the second degree cases. See generally, State v. Adlington-Kelley, 95 Wn.2d 917, 631 P.2d 954 (1981).

RCW 9.95.040 requires a minimum five year prison term if an individual is convicted of a felony while armed with a deadly weapon, which can include a pistol, revolver, or any other firearm. RCW 9.95.040(2). RCW 9.95.040(2) only applies if an individual is sentenced to prison for an offense committed prior to July 1, 1984. See generally, RCW 9.94A.905; In Re Blair, 38 Wn.App. 670, 688 P.2d 532 (1984).

Petitioner maintains that under the standard of review in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 576 (1979) and In Re Windship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), no rational trier of fact could have found all the material elements of the crime

beyond a reasonable doubt, thus requiring reversal and dismissal of Mr. Landon's convictions both for underlying crime of assault in the second degree and for the penalty enhancement finding for the use of a deadly weapon. See generally, Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

To be guilty as a principal of the crime of assault in the second degree under the only mode alleged in this case, one would have to actually fire the weapon. Otherwise, one could only be guilty of complicity as an accomplice. In Washington, one becomes an accomplice, if:

> . . . with knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aids such other person in planning or committing it; . . . RCW 9A.08.020(3)(a).

An accomplice must share the general criminal intent of the principal, State v. Lauraano, 101 Wn.2d 754, 682 P.2d 889 (1984); State v. Boast, 87 Wn.2d 447, 553

P.2d 1322 (1976), and the level of participation needed to be an accomplice is significantly more than mere presence even when an individual knows a crime is being committed. In Re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979).

Although the state was not required to charge an individual as an accomplice in order to give an accomplice instruction to the jury as was done in this case, there must be sufficient evidence under the Jackson v. Virginia standard of either the accomplice or the principal theory to uphold the conviction on appeal. See generally, State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974); State v. Gillespie, 41 Wn.App. 640, 705 P.2d 808 (1985).

In this case, the decision of the Washington Court of Appeals conflicts with Jackson v. Virginia, supra and In Re Windship, supra, because no rational trier of fact could have concluded beyond a reasonable doubt on this record that Mr.

Landon was guilty of the crime as a principal. Even Mr. Mikes was unable to see who fired the weapon, and although Mr. Mikes rendered an opinion that Mr. Landon's hand was on the gun, he never stated that as a fact, but rather, he said it was Mr. Landon in his "vision". Even if all doubts are resolved in favor of the state, the context of Mr. Mikes statement reveals that he merely speculated that Mr. Landon fired the weapon.

The only refuge for the state was in the theory of accomplice liability. However, it is clear the state could not prove that alternate mode either. There is absolutely no evidence on the record that Mr. Landon planned the assault with the other two unnamed individuals. A series of phone calls and a dispute over a car title does not rise to that level of proof. Indeed, the defense at trial made it clear that neither Mr. Mikes nor Mrs. Mikes could conceive any reason why Mr. Landon would want to shoot Mr. Mikes,

especially given his close relationship to the Mikes family. The state's accomplice theory thus must fall as well.

Mr. Mikes' own version of the incident, in which Mr. Mikes grabbed a gun and then the shots were fired, was completely consistent with an accidental discharge of the weapon. That must be deemed insufficient to constitute a knowing assault under Washington State law. See generally, State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984) (absence of excuse or self defense must be proved beyond a reasonable doubt by the state in a charge of assault in the second degree whether there is some evidence of those issues on the record). The state completely failed to prove that the infliction of the grievous bodily injury was knowingly done by Mr. Landon, either as an accomplice or as a principal.

Under Jackson v. Virginia, supra, and In Re Windship, supra, the Washington Court of Appeals was required to reverse

and dismiss the conviction. Unfortunately, the court did not do so and therefore, its decision involves an important question of federal law regarding the application of an appellate standard review of the sufficiency of evidence in a criminal case under the due process clause in a way which conflict with the applicable decisions of this court, thereby requiring this court to grant the Petition for Writ of Certiorari. See generally, Rule 17(c); See generally, United State v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984).

Moreover, the deadly weapon finding cannot be sustained on review under the Jackson v. Virginia standard. The record does not reveal that the state ever proved that Mr. Landon, in fact, possessed the weapon in this case. The state was never able to show beyond a reasonable doubt who the other two individuals were who went to Mr. Mikes, or that Mr. Landon even knew the third individual, who was the most

likely person who possessed or fired the gun. Therefore, the Court of Appeals' decision conflicts with Jackson v. Virginia, and the Ninth Circuit Court of Appeals in United States v. Reese, 775 Fed.2d 1066 (9th Cir. 1985) (proximity to weapon in and of itself insufficient to uphold deadly weapon finding on review.); Rule 17.1(b) and (c).

CONCLUSION

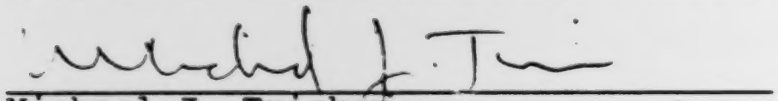
For the reasons noted above, the Petition for Certiorari should be granted. The case presents a conflict between the state court decision and a federal court, appeals decision providing grounds for review under Rule 17.1(b). In addition, the state court decision also conflict with applicable decisions of the Supreme Court offering an alternative grounds for review under Rule 17.1(c). This court should grant the Petition for the Writ, accept review, reverse Mr. Landon's conviction, and dismiss with prejudice because a retrial would be barred under

the double jeopardy clause of the United States Constitution as applies to the states. Burks v. United States, supra.

DATED this 4th day of December, 1987.

Respectfully submitted,

APPELWICK, TRICKEY, SLUITER & SPICER



Michael J. Trickey
Counsel of Record

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent,	)	NO. 9152-6-II
	)	Division Two
v.	)	Unpublished Opinion
PARIS DARNELL LANDON, Appellant.	)	Filed July 7, 1987

PETRIE, J.*1 -- Paris Darnell Landon appeals a judgment and sentence imposed following his conviction by jury verdict of the crime of second degree assault while armed with a deadly weapon, to-wit: a firearm. On appeal, defendant contends the trial court erred (1) by denying his motion to dismiss the information at the conclusion of the State's opening statement; (2) by entering judgment and sentence based on the jury's verdict of guilt of the crime charged and its special verdict that at the time of the commission

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1 * Judge Harold J. Petrie serving as a judge pro tempore of the Court of Appeals, pursuant to CAR 26(c).

of the crime defendant or his accomplice was armed with a deadly weapon, a firearm. We find no error and affirm the judgment and sentence.

Defendant's challenge to the jury's two verdicts is based on a contention that there is insufficient evidence in the record to prove beyond a reasonable doubt that defendant or an accomplice, with defendant's knowledge, fired the weapon which struck the victim, Thurmond Mikes.

It is absolutely clear from the record that late in the night of March 25, 1984, defendant and two other men came to the victim's home, that defendant and another huddled closed together just inside the entrance "standing so close as if they were blocking the doorway entrance," and that the third man was just outside the entrance. When Mr. Mikes came to the entrance, a heated discussion occurred over possession of title to another party's car. At some point during the discussion, Mikes was shot in the

finger and in the chest by a weapon fired by one of the three men. Mikes testified that the third man "did not have a gun in his hands" but that the "gun came out of Paris' coat, or in between him and the other guy, but it came up with Paris' hand."

In reviewing the sufficiency of the evidence to support a guilty verdict, the appellate court views the evidence in a light most favorable to the State and determines whether any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 161 P.2d 628 (1980). Viewed in that light, we conclude that the jury could have found defendant guilty as the principal in the commission of the crime and also that during the commission of that crime he was armed with a firearm, a deadly weapon.

Defendant's contention that the trial court erred by failing to grant his motion to dismiss at the conclusion of the

prosecutor's opening statement at commencement of trial is based on the prosecutor's statement that the State was prepared to proceed on the "theory that Mr. Landon or an accomplice, Mr. Landon or one of these other men, actually shot Mr. Mikes," that Landon was the organizer of the episode, but that "Thurmond's not going to be able to tell you exactly who it is" that shot him.

The trial court properly denied the defense motion. A motion to dismiss after the prosecutor's opening statement may be granted only when it is clear beyond a doubt that the statement affirmatively includes fact matter which constitutes a complete defense to the charge or expressly excludes fact matter essential to a conviction. State v. Gallagher, 15 Wn.App. 267, 549 P.2d 499 (1976). The prosecutor's opening statement was sufficient to withstand the challenge made. We find no error.

Judgment affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____

WE CONCUR:

_____

_____

THE SUPREME COURT
State of Washington

October 6, 1987

Appelwick, Trickey, Sluiter
& Spicer
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2611 N.E. 125th Street
220 Lake City Professional Cntr.
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Honorable John Ladenburg
Pierce County Prosecutor
Ms. Kathleen Proctor, Deputy
Pierce County Courthouse
Tacoma, Washington 98402

Re: Supreme Court No. 54211-2 -
State v. Paris Darnell Landon
Court of Appeals No. 9152-6-II

Counsel:

The above entitled petition for review was considered by the Court on its October 6, 1987, petition for review calendar.

The petition was denied by order number 169/28 filed October 6, 1987.

Very truly yours,

REGINALD N. SHRIVER
Supreme Court Clerk

RNS:crf

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,	)	NO. 9152-6-II
	)	
Respondent,	)	MANDATE
	)	
v.	)	Pierce County
	)	Cause No.
PARIS DARNELL LANDON,	)	84-1-00615-5
	)	
Appellant.	)	

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on July 7, 1987, became the decision terminating review of this court in the above entitled case on October 6, 1987. This cause is mandated to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. The prevailing party has filed a cost bill in the amount of $170.27. Costs are taxed in favor of Respondent and against Appellant in such amount.

cc: Indeterminate Sentence Review Board

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Judge William L. Brown, Jr.
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IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Tacoma, this 17th day of November, 1987.

_____

Clerk of the Court of
Appeals, State of
Washington, Div. II